1974

The Regulation of Corporate Image Advertising

Minn. L. Rev. Editorial Board

Note: The Regulation of Corporate Image Advertising

American consumers are increasingly being exposed to corporate image advertising.[1] Reflected in the increased expenditures devoted to it,[2] this growing use of corporate image advertising has raised serious questions about its regulation.[3] While the general regulation of advertising by the Federal Trade Commission (FTC) is well established, corporate image advertising has remained unregulated.[4] This Note will outline the development and use of corporate image advertising, evaluate the extent of first amendment protection, and discuss possible FTC regulation.

I. THE DEVELOPMENT OF CORPORATE IMAGE ADVERTISING

A. Definitions

Corporate image advertising sells "ideas" rather than products.[5] Although the subject matter of image advertising is thus intangible, there are apparently two more or less distinct types of "ideas". The first is the image of the advertising corporation itself as an abstract reality. The second is the advertising corporation's position on issues which may appear not to concern the corporation directly, but on which it still wishes to express its opinion.

The concept of image advertising seemingly implies the existence of a corporate image. In its everyday transactions, a cor-

1. Hewens & Poppe, *Corporate Advertising: New Imperatives for an Old Device*, 28 Pub. Rel. J., Nov., 1972, at 8.

2. For example, corporate image advertising expenditures increased from approximately $158 million in 1971 to $182 million in 1972. *1971-72 Expenditures for Corporate and Association Advertising*, 29 Pub. Rel. J., Nov., 1973, at 30 (The corresponding figure for 1973 is not as yet available.) However, such expenditures are still only a minute portion of the nation's total advertising budget which amounted to approximately $21 billion in 1971 and $23 billion in 1972. U.S. Bureau of the Census, Statistical Abstract of the United States 758 (1973). During 1973 expenditures for all advertising hovered at $25 billion. Advertising Age, Dec. 17, 1973, at 3, col. 1.

3. *See* 103 Time, Feb. 11, 1974, at 30; Advertising Age, Aug. 9, 1971, at 3, col. 1.

4. Institutional advertising, as corporate image advertising has also been called, was involved in R.H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964). The practice at issue, however, was an advertising allowance, not the advertising itself.

5. G. Flanagan, Modern Institutional Advertising 7 (1967).

poration transmits numerous messages to customers, employees, shareholders, and others with whom it deals.[6] The corporate image might be defined as the sum of all the impressions created by these messages.[7] Unable to perceive or comprehend all the numerous facets of corporate activity, the public tends to condense its understanding of the corporation into a more manageable concept.[8] If generally held by the public, this simplified concept can be viewed as the corporation's image.[9]

Like advertising, public relations is used by the corporation to shape its image.[10] The task of public relations is to identify the favorable and unfavorable elements of the image and then to emphasize to the public the former while de-emphasizing the latter. Public relations is generally carried out through all forms of communications except paid advertising.[11] Paid advertising, in its most familiar form of product advertising, is the use of any paid forum for the purpose of imparting information, developing attitudes, and inducing action beneficial to the advertiser, such as the purchase of a particular product or service.[12] A specific type of product advertising is brand advertising, which seeks to create a unique set of properties or mental images corresponding to the advertised brand, so that these properties or images might affirmatively influence the consumer's buying decision.[13] Corporate image advertising is a hybrid creature designed to use the means of paid advertising to accomplish the goal of public relations. Unlike product or brand advertising, it seeks to create a favorable impression of the corporation

6. Marinteau, *Sharper Focus for the Corporate Image*, 36 HARV. BUS. REV., Nov.-Dec., 1958, at 53-54.

7. J. CRAWFORD, ADVERTISING 23, 446 (2d ed. 1965). G. FLANAGAN, *supra* note 5, at 66-67, defines a corporation's image as its "personality" or its "reputation." E. BRINK & W. KELLEY, THE MANAGEMENT OF PROMOTION 156 (1965) defines the corporation's image as the "stereotype" with which the public equates the company.

8. H. HEPNER, ADVERTISING—CREATIVE COMMUNICATION WITH CONSUMERS 209 (1964).

9. G. FLANAGAN, *supra* note 5, at 64, suggests that there is not a single "image" of a corporation, but that the image is personal to the beholder. If that were true, however, there would be no logic in attempting to shape the corporation's image through advertising, as each individual would have to be approached separately.

10. B. ZOLLO, THE DOLLARS AND SENSE OF PUBLIC RELATIONS 6 (1967).

11. L. BLUMENTHAL, THE PRACTICE OF PUBLIC RELATIONS 3 (1972).

12. R. COLLEY, DEFINING ADVERTISING GOALS FOR MEASURED ADVERTISING RESULTS 51 (1961).

13. C. SANDAGE & V. FRYBURGER, ADVERTISING THEORY AND PRACTICE 205-07 (1958).

itself rather than just a product or brand, but unlike public relations, it is conducted through paid advertising.

Corporate image advertising may also be concerned with the other type of "idea" in the broad subject matter of nonproduct advertising.[14] Through the use of "advertorials," the advertiser may communicate his position on matters which he considers important, although they are not directly related to the advertiser's own image. This is a less common but increasingly important type of corporate image advertising.

There is no clear distinction in the effects of these two types of advertising. In some cases, for example, the stand which a corporation takes on public issues will affect its image markedly. It is nevertheless possible to analyze problems of regulation in terms of two types of corporate image advertising designed to perform two separate functions—sales-oriented advertising to improve a corporation's position in the market, and issue-oriented advertising to obtain access to the forum of opinion on general issues affecting the business climate or the public welfare. The ultimate goal of both types of advertising may well be economic benefit to the corporation.[15]

B. History and Current Use

A review of the development of corporate image advertising will demonstrate how it has been utilized. The publication in the fifties of *The Mass Image of Big Business*[16] by Gardner and Rainwater and other articles and studies on the image of big business and its economic consequences gave rise to a rash of corporate identity advertising campaigns.[17] Simply put, the thesis was that the average American had serious misgivings about the size and remoteness of big business, misgivings which could adversely affect his buying decisions.[18] Corporate identity campaigns were undertaken to dispel those misgivings and to instill

14. *Id.* at 104.

15. In a closely related context, proponents of increased "corporate responsibility" sometimes justify the active intervention of corporations and their money in social problems such as urban decay and underemployment on the ground that business is better off in a generally healthier society. Albrook, *Business Wrestles With Its Social Conscience*, 78 Fortune, Aug., 1968, at 88; Blumberg, *Corporate Responsibility and the Social Crisis*, 50 Boston U.L. Rev. 157, 162-63 (1970).

16. Gardner & Rainwater, *The Mass Image of Big Business*, 33 Harv. Bus. Rev., Nov.-Dec., 1955, at 61-66.

17. B. Zollo, *supra* note 10, at 60.

18. Martineau, *supra* note 6, at 58.

in the consumer an image of the advertiser as an entity which he could trust.

This trend in advertising produced a bandwagon effect[19] which eroded the credibility of the advertisements themselves and complicated the already difficult task of assessing their effectiveness. By the early sixties, a reaction had set in critically questioning the basic premise that the consumer's buying decision might be significantly influenced by the image of the company from which he buys.[20] This premise was never conclusively established, but neither was it conclusively discredited; at best the critics assailed the corporate identity binge by condemning specific advertising campaigns that proved useless or even counter-productive. Possibly the epitome of the latter was the steel company advertisement depicting a burly steelworker to create an image of strength, but instead creating the image of a bully.[21]

This reaction did not eliminate corporate image advertising, but merely dispelled some of its mystique. In the late sixties, corporate image advertising was used to meet new challenges, principally the assaults of the consumer movement[22] and the growing popular impression that business was responsible for, yet indifferent to, rising social problems such as pollution and urban blight.[23] Utilizing both sales-oriented and issue-oriented corporate image advertising, a company could fend off assaults by creating the favorable image of a concerned, dynamic company involved in the solution of social problems,[24] and also by

19. *See* G. FLANAGAN, *supra* note 5, at 63-64.

20. Finn, *Stop Worrying About Your Image*, HARPERS, June, 1962, at 77.

21. G. FLANAGAN, *supra* note 5, at 67-68.

22. Hewens & Poppe, *supra* note 1, at 10: "Social awareness emphasis has dwelled heavily upon such concerns as auto safety, ecology, interpersonal relationships, inflation, consumerism." Related to the need to respond to "consumerism" is the need for good relations with government agencies. Martineau, *supra* note 6, at 54, states that, "I think . . . the corporate image is extremely important in dealing with government functionaries." *See also* G. FLANAGAN, *supra* note 5, at 19.

23. Day, *Closing the Credibility Gap In Environmental Control*, 40 BUS. MGMT., June, 1971, at 36. The response of business is summed up in the "social responsibility doctrine." *See* McDonald, *How Social Responsibility Fits the Game of Business*, 82 FORTUNE, Dec., 1970, at 104-05. *See also* note 15 *supra*.

24. One of the more glaring failures in this endeavor was an advertisement by Potlatch Industries. In a promotion of its pollution expenditures, the company pictured the Clearwater River, on which its plant is located, as clean and free of pollution. Unfortunately, the picture was of the river *upstream* from the plant. *See We Nominate for Oblivion*

expressing its own opinion as to the correct solutions for society to adopt. The entire episode made prophets of Gardner and Rainwater, who had stated in 1955 that "unless management understands the public's underlying feelings, it can unwittingly pave the way for hostile reactions and a lowering of the prestige of big business."[25]

Currently, although corporations must still contend with the criticism of consumer and environmental interests,[26] an economy plagued with shortages presents corporate image advertising with new challenges. Shortages of paper and energy are expected to restrict the volume of the regular media, particularly the printed media, thus diminishing the amount of media space available for public relations. A contraction of normal public relations operations, such as press releases, through which corporations have long projected their images, will foist these functions upon paid corporate image advertising.[27]

The uncertain availability of products in a shortage economy will also cause a switch from product advertising to image advertising. Especially in the utilities industry, the current message of many advertisements encourages conservation rather than consumption and portrays the utility company's concern about an energy shortage and its efforts to overcome it. The objective is to survive the shortage period with as few disruptions of service as possible, and one means is to restrain demands for service.[28]

The energy shortage has also caused an attempt by the oil industry to avert undesirable political repercussions by responding to its critics through corporate image advertising.[29] The

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Those Stupid, Hypocritical Corporate Ads, 56 INDUST. MKTG., March, 1971, at 68.

25. Gardner & Rainwater, *supra* note 16, at 66.

26. Brouillard, *Some Advantages of Corporate Advertising* (editorial), 29 PUB. REL. J., Nov., 1973, at 3. "Consumerism" may not have the same impact in the 70's as it had in the 60's. *See* Advertising Age, Dec. 17, 1973, at 28, col. 1. The need to comment on public issues in general, however, may be increasing. *See* Danko, *A Perspective on Corporate Communications*, 30 PUB. REL. J., Aug., 1974, at 10; Advertising Age, March 4, 1974, at 6, col. 2.

27. Kindse & Callahan, *Facing the Issues: Corporate Advertising's Greatest Challenge*, 29 PUB. REL. J., Nov., 1973, at 7. *Cf.* Cohan, *The New Role of Advertising in a Period of Shortage*, 58 INDUS. MKTG., Nov., 1973, at 66, 68 (advertisements should advocate product efficiency, conservation, and utility).

28. Springer, *Demarketing Power: Utility Companies Explain the Energy Crisis*, 29 PUB. REL. J., Nov., 1973, at 32.

29. 103 TIME, Feb. 11, 1974, at 30.

pattern of problem and response in the oil industry is typical of public relations, and probably foreshadows a major use of corporate image advertising in the future. Shortages which cause curtailment of supply can result in consumer unrest, which in turn can spawn consumer action. To prevent adverse action, the industry must respond to the unrest, a task for which corporate image advertising is best suited.

Outside of industries beset by shortages, corporate image advertising is currently used primarily to promote sales rather than to express the corporation's opinion in the public forum. The promotion of sales may be pursued in two ways, both based on the premise that the consumer's buying decision is influenced by his impression of the producer. One technique is known as "corporate positioning"—an effort by the corporation to make its own name more or less synonymous with the product it makes.[30] For example, Campbell's is not just a producer of soup, Campbell's *is* soup. This is not because there are no other producers of soup, or because Campbell's produces nothing but soup, but Campbell's advertising has so reinforced the message that Campbell's is the primary soup producer that this idea has become virtually impregnated in the American culture. Ultimately, the goal of corporate positioning is to establish the manufacturer or seller as a strong, reputable leader in the industry, whose products must reflect its integrity and leadership.[31]

The other current technique of corporate image advertising is to project or transfer a corporate identity.[32] This is an important goal for a firm whose diversified holdings do not accord with the established identity of the parent firm.[33] In order for the company's employees to see their employer in proper perspective, the corporation should have an identity to which

30. Hewens & Poppe, *supra* note 1, at 8.

31. Effective "corporate positioning" can help a corporation ride out a crisis. For example, another soup producer, Bon Vivant, was forced into bankruptcy by adverse publicity resulting from the production of some contaminated soup. At nearly the same time, a few cans of Campbell's soup, suspected of being contaminated, created hardly a ripple because Campbell's reputation was much better established. *See* W. Salter, Upbeat! Just What is Corporate Advertising? (Time, Inc. memo (no date) on file in Univ. of Minn. Law Library).

32. BUS. WEEK, Feb. 20, 1971, at 52-53.

33. Stone, *What's Ahead for Corporate Advertising*, 28 PUB. REL. J., Nov., 1972, at 62. B. ZOLLO, *supra* note 10, at 67, cites Morton Salt Company as an example of a corporation which enjoyed a firmly established identity in one field and then sought to project that identity into other areas.

they can relate and which can survive the acquisition of diversified holdings.[34] This argument for an identity applies with even greater force to the company's customers, whose loyalty to the parent firm cannot be transferred to the subsidiary, or vice versa, unless each can be identified with the other.[35]

C. Effectiveness of Corporate Image Advertising

The effectiveness of any form of advertising is difficult to determine.[36] In *Confessions of an Advertising Man*, David Ogilvie relates the dilemma of the businessman who states, "Half the money I spend on advertising is wasted, and the trouble is I don't know which half."[37] The effectiveness of product advertising can theoretically be measured by the level of sales of the product: if sales improve following an advertising campaign, the increase can in some cases be attributed to the advertising.[38] But there are few statistics. With respect to corporate image advertising, the uncertainty is compounded by the lack of a standard of measurement. Corporate image advertising—even if "sales-oriented"—is designed to sell ideas rather than products, and its effect on product sales is at best indirect. Consequently, there is no monetary gauge of the effectiveness of corporate image advertising.[39] Other measurements are designed only to reflect the public's "awareness" of or "favorability" towards the corporation,[40] and while they can show changes in public opinion, these measurements are difficult to translate into terms of profit and loss.

The translation of public opinion into profit and loss raises a basic question about the theory of corporate image advertising. There has been an implicit assumption that the public's opinion of a corporation—that is, its image—somehow influences the

34. *Id.* at 61-62.
35. H. Hepner, *supra* note 8, at 216.
36. A. Frey & J. Halterman, Advertising 483-84 (4th ed. 1970).
37. D. Ogilvie, Confessions of an Advertising Man 59 (1966).
38. A. Frey & J. Halterman, *supra* note 36, at 483.
39. *See* Moodie, *Organizing the Communications Effort*, 28 Pub. Rel. J., Nov., 1972, at 20.
40. Grass, *Measuring Corporate Image Advertising Effects*, 12 J. Advertising Research, Dec., 1972, at 15-22, relates research done on duPont advertising, concludes that the campaign increased "favorability," but does not suggest what benefit duPont received from this "favorability." In the early fifties, the A & P supermarket chain, faced with an antitrust suit, enlisted extensive popular support. The results of the litigation were favorable to A & P, but not necessarily because of this public support. *See* G. Flanagan, *supra* note 5, at 23, which suggests that the advertising did influence the outcome of the case.

consumer's buying decision.[41] This assumption has been criticized for lack of proof, as there have been no empirical studies supporting it. But by the same token there is no empirical data disproving it.[42] There is at best a subjective feeling within the advertising industry that advertising must sell more than the product—it must sell the company responsible for the product.[43]

In addition to the ground that the image is not relevant, corporate image advertising is also criticized as ineffective on the ground that advertising by itself cannot create an image. Advertising can only build upon reality.[44] If not supported by reality, the image advertising will merely aggravate distrust and cynicism.[45]

The effectiveness of issue-oriented advertising is even more speculative. Either because this form of corporate image advertising has been relatively uncommon or because it is not expected to have any impact beyond dissemination alone, the advertising industry apparently has not addressed the subject of its monetary effectiveness.

While the effectiveness of corporate image advertising is the subject of some disagreement, even among advertisers them-

41. Martineau, *supra* note 6, at 58. However, Finn, *supra* note 20, argues that the connection between the image and the purchasing decision is not well established. *Cf.* Geist, *Confessions of an Ad Manager*, 93 DUN'S REVIEW, April, 1969, at 54:

> Advertising has one purpose: to help sell a company's product or capabilities. There is no valid distinction between promotion of products and corporate image—which just means reputation for reliability. A customer buys both, or he buys neither.

42. J. HOWARD & J. SHETH, THE THEORY OF BUYER BEHAVIOR (1969) is an in-depth study of the buying decision, but it does not treat the producer's image at all. V. LESSIG, PERSONAL CHARACTERISTICS AND CONSUMER BUYING BEHAVIOR: A MULTIDIMENSIONAL APPROACH 5-14 (1971) reviews all the major buying studies of the past decade, none of which have treated the relevance of the producer's image. At best, these studies indicate that a favorable brand image may be influential, but stop short of equating brand image with producer image.

43. Geist, *supra* note 41, at 54. *Companies Face An Identity Crisis*, BUS. WEEK, Feb. 20, 1971, at 54.

44. Berkwitt, *Does the Corporate Image Really Change?*, 95 DUN'S REVIEW, Jan., 1970, at 19.

45. Dalton, *Corporate Advertising . . . "A Short Course in Bootstrap Self-Improvement,"* 28 PUB. REL. J., Nov., 1972, at 67, suggests that image advertising will encourage the company and its employees to be what they are advertised to be. Whether or not in practical terms this will happen is not clear. The effort to "clean up" the image may encourage the corporation to "clean up" any obnoxious practices, but the evidence for this proposition is sketchy.

selves,[46] there is no indication that it is being abandoned. On the contrary, the increasing reliance on corporate image advertising is perhaps the strongest indication of its recognized effectiveness.[47]

II. ADVERTISING UNDER THE FIRST AMENDMENT

A. THE COMMERCIAL EXCEPTION

The doctrine that the protections of the first amendment do not apply to commercial advertising was abruptly announced in 1942, in *Valentine v. Chrestensen.*[48] Citing no authority and discussing no public policy,[49] the Court upheld a municipal sanitation ordinance invoked to prohibit the distribution of a handbill with both a political and a commercial message. The Court held that states were free to regulate commercial advertising because it was not speech within the meaning of the first amendment.[50] In reaching this result, the Court was not troubled by the handbill's purported political message, because it had been included on the handbill "with the intent, and for the purpose, of evading

46. *See* Advertising Age, May 21, 1973, at 20, col. 1; Advertising Age, Nov. 15, 1971, at 3, col. 3.

47. *See* note 2 *supra*. *See also*, B. ZOLLO, *supra* note 10, at 2-3.

48. 316 U.S. 52 (1942). In Schneider v. State, 308 U.S. 147 (1939), which reversed, on first amendment grounds, several convictions under municipal ordinances regulating the distribution of handbills, the Court may have been indicating the pattern of things to come. The Court stated, as dictum, that: "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance [in that case] requires." *Id.* at 165.

49. Justice Douglas, concurring in Cammarano v. United States, 358 U.S. 498, 513-14 (1959) stated that:

> *Valentine v. Chrestensen*, 316 U.S. 52, 54, held that business advertisements and commercial matters did not enjoy the protection of the First Amendment, made applicable to the States by the Fourteenth. The ruling was casual, almost offhand. And it has not survived reflection.

50. 316 U.S. at 54-55. Although not protected as speech under the first amendment, advertising is protected as property under the fourteenth amendment. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 105 n.46 (1966) [hereinafter cited as EMERSON, GENERAL THEORY]; Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 430 (1971). Prior to *Chrestensen*, regulation of advertising had been treated solely as a due process issue. *See* Packer v. Utah, 285 U.S. 105 (1932); Fifth Ave. Coach Co. v. New York, 221 U.S. 467 (1911). While *Chrestensen* dealt strictly with the mode of dissemination, the doctrine has been extended to permit the regulation of advertising content as well. E.F. Drewl & Co. v. FTC, 235 F.2d 735, 739 (2d Cir. 1956), *cert. denied* 352 U.S. 969 (1957); American Medicinal Prods., Inc. v. FTC, 136 F.2d 426 (9th Cir. 1943); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 417 (1970) [hereinafter cited as EMERSON, SYSTEM].

the prohibition of the ordinance."[51] Thus the Court obliquely enunciated a primary-purpose test for determining if an advertisement is commercial and thus subject to regulation.

The primary-purpose test was expanded in *Breard v. City of Alexandria*,[52] in which the Court upheld an ordinance prohibiting salesmen from canvassing a community house-to-house for magazine subscriptions. Although the issue of freedom of the press was raised, the Court concluded that the purpose of selling magazine subscriptions was primarily commercial and the activities were therefore not protected.[53] This conclusion might imply that freedom of speech is protected only until it is used to obtain a financial return. However, later cases have made it clear that because the exercise of free speech is in some circumstances dependent on a financial return, the presence of a commercial transaction alone is not enough to deny first amendment protection.[54] Thus, in *New York Times Co. v. Sullivan*,[55] an advertisement soliciting support for the civil rights movement was held to be protected speech even though it sought financial contributions as well as moral support. The Court stated:

> The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.[56]

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51. 316 U.S. at 55.
52. 341 U.S. 622 (1951).
53. *Id.* at 642.
54. EMERSON, SYSTEM, *supra* note 50, at 416-17, citing Smith v. California, 361 U.S. 147, 150 (1959). In Cammarano v. United States, 358 U.S. 498, 514 (1959), Justice Douglas stated, in a concurring opinion: "Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive." *See also*, Comment, *The First Amendment and Commercial Advertising: Bigelow v. Commonwealth*, 60 VA. L. REV. 154, 158 (1974).
55. 376 U.S. 254 (1964).
56. *Id.* at 266. The court did not make clear the distinction between commercial and noncommercial advertising, and the quoted passage can be read to mean either that the advertisement was not commercial *and* it addressed an issue of "the highest public issue and concern," or that the advertisement was not commercial *because* it addressed a public issue. Justice Brennan recited several elements of the advertisement, stating that it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support," but he did not indicate whether those elements are decisive or merely descriptive. *Id. See Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1029 n.16 (1967).

Although the impact of *New York Times* was to constitutionally exempt comment about official conduct from libel actions,[57] the opinion suggests a general rule that advertising which comments upon "matters of the highest public interest and concern" is noncommercial. This approach to distinguishing commercial and noncommercial advertising was apparently adopted in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.*[58] In holding that the states can constitutionally prohibit job advertisements that state a sex preference, the Court stated:

> We emphasize that nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preference in employment.[59]

Although this was dictum, the Court clearly recognized that the commercial exception doctrine does not remove all advertising from first amendment protection. While other factors may also be involved, the expression of opinion on a public issue is a factor common to both *New York Times* and the *Pittsburgh Press* dictum.

B. Application to Corporate Image Advertising

Sales-oriented corporate image advertising serves the function of improving the advertiser's image and thus of promoting an economic benefit such as sales revenue. For the same reasons that product advertising can be regulated, there is little doubt that corporate image advertising oriented *solely* toward an eco-

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57. Subsequent libel cases have delineated a large "public concern" exemption under the first amendment. Julian Messner, Inc. v. Spahn, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 865 (1966), *vacated per curiam*, 387 U.S. 239 (1967) (broadening the scope of *New York Times* to include "public figures"); Time, Inc. v. Hill, 385 U.S. 374 (1967) (including "newsworthy items" under the *New York Times* rule); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (expanding the rule to cover matters of "public or general concern"); Getz v. Robert Welch, Inc., 94 S. Ct. 2997 (1974) (overruling *Rosenbloom*, holding that public issues are not covered by the *New York Times* rule).

58. 413 U.S. 376 (1973).

59. *Id.* at 391. Plaintiff newspaper argued that because it exercised "editorial discretion" over the placement of want-ads, the activity was more than strictly commercial. The Court rejected this argument, and the decision of the Court on this matter can be read as a determination either that the alleged "editorial discretion" did not exist, or more probably, that it was insufficient to offset the primarily commercial nature of the activity. *Cf.* Miami Herald Publ. Co. v. Tornillo, 94 S. Ct. 2831 (1974) (right-to-reply statute struck down as an infringement on "editorial discretion." *See* text accompanying notes 166-69 *infra*).

nomic benefit is not protected by the first amendment.[60] The problem arises with issue-oriented advertising, which seeks to provide the advertiser a means to speak out on public issues.[61] In the light of the guidance presently available, it appears that such corporate image advertising would be outside the first amendment's protection and subject to regulation if and only if it is regarded as "commercial."[62]

1. Tests for Commercial Content

Recent commentators have suggested a "marketplace" test for distinguishing between commercial and noncommercial advertising and thus delimiting the commercial exception doctrine.[63] Starting from the proposition that protection should be

60. The same conclusion was reached by FTC Chairman Lewis A. Engman in a speech to the Antitrust Section of the State Bar of Michigan on Feb. 17, 1974. Mr. Engman concluded: "[T]o the extent that such [corporate image] ads like product ads, seek to . . . encourage economic responses . . . they are subjects of legitimate interest to the Federal Trade Commission" 5 TRADE REG. REP. ¶ 50,200, at 55,377 (FTC 1974). FTC Consumer Protection Bureau Director J. Thomas Rosch, responding to a request by certain congressmen that the FTC investigate oil company advertising, concluded: "Nevertheless, I think that the First Amendment cannot be used as a shield when that garb is simply a sham and the advertiser is actually intending to sell his product through unfair or false advertising. . . ." 646 BNA ANTITRUST TRADE REG. REP. A-11 to -12 (Jan. 15, 1974).

61. *See* text accompanying note 14 *supra.*

62. There are no cases specifically dealing with the application of the commercial exception doctrine to corporate image advertising. The problem of regulating advertising in which a social issue is included in the context of a commercial message is presented by two recent cases dealing with the advertising of abortion referral agencies. In Mitchell Family Planning, Inc. v. Royal Oak, 335 F. Supp. 738 (E.D. Mich. 1972), it was held that the advertising in question did not pose a "clear and present danger" that the city policy against abortion would be violated. *See* Comment, *Constitutional Law—The First Amendment and Advertising: The Effects of the "Commercial Activity" Doctrine on Media Regulation,* 51 N.C.L. REV. 581 (1973). In Bigelow v. Virginia, 213 Va. 191, 191 S.E.2d 173 (1972), *vacated,* 413 U.S. 909, *aff'd on rehearing,* 214 Va. 341, 200 S.E.2d 680 (1973), a misdemeanor conviction for violation of an ordinance prohibiting advertising for abortions was upheld because the advertising was outside the first amendment. *See* Comment, *supra* note 54. In neither case did the court address the utility of the advertising in the social debate on abortion. For a discussion of the uses of commercial advertising as a vehicle of free debate, see Redish, *supra* note 50, at 443. *See also* text accompanying notes 69-72 *infra.*

63. Bird, Goldman & Lawrence, *Corporate Image Advertising: A Discussion of the Factors that Distinguish Those Corporate Image Advertising Practices Protected Under the First Amendment from Those Subject to Control by the Federal Trade Commission,* 51 J. URBAN L. 405 (1974).

presumed unless specified conditions are met, this test permits regulation only if the corporate image advertising makes statements about the advertiser's business and these statements have an appreciable influence on consumers in the market place. This test has the advantage of certainty. It also has the advantage of being supported by current regulatory practice.[64] However, even assuming that it is possible to determine when the requisite conditions are satisfied, the test nonetheless is not sufficiently flexible to apply to all the variations of use in which corporate image advertising may be employed. Essential to this test is the assumption that in any one advertisement there is no overlap of the sales-oriented and issue-oriented purposes served by corporate image advertising. To the extent that public issues can be addressed by the advertiser to improve its position in the market, and efforts to improve market position can raise issues of importance to public decision making, the test is inadequate.[65]

A second possible method of drawing a line between the commercial and the noncommercial is to focus on the advertiser's intent. Where an economic benefit is intended, the advertisement would be commercial, regardless of what issues it addresses. Any method concerned with intent, however, involves obvious problems of proof,[66] especially in the case of corporate image advertising where different messages can be intended for different audiences.[67] Furthermore, what is intended and what actually results are not necessarily synonymous, for a message may be misunderstood or rejected. In order to reflect reality, an inquiry should look beyond intent.

To the extent that this economic-benefit test rests on a finding of benefit reasonably expected, rather than primarily in-

64. *See Developments in the Law—Deceptive Advertising, supra* note 56, at 1031-32. The FTC's power to prevent the dissemination of a pamphlet which erroneously asserts that the use of aluminum cookware is unsafe has been held to turn on the presence of a commercial interest in dissemination. *Compare* Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941) (cease and desist order set aside because the respondent had no commercial interest in the sale of cookware) *with* Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941) (cease and desist order enforced with respect to dissemination of the same pamphlet because respondent had a commercial interest in the sale of non-aluminum cookware).

65. *See* text accompanying note 15 *supra.*

66. Significantly, the FTC has long considered intent immaterial, partly because of the problem of proof. *See* Kintner, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269, 1280 (1966).

67. *See* Brouillard, *supra* note 26, at 3.

tended, the test becomes too inclusive. Because of the expense involved in advertising, only a most atypical advertiser would not expect to derive at least some economic benefit from the expenditure. But it might not be appropriate to deny first amendment protection to otherwise political speech in the form of paid advertising simply because it is connected with an economic benefit. If, for example, the Court in *New York Times* had considered the ultimate economic benefits of better jobs, improved education, and a higher living standard which the civil rights movement sought, it might not have so easily found the advertisement protected by the first amendment under a strict economic-benefit test.[68] It would seem that some measure of proximity or directness between the advertisement and the resulting benefit is required; therefore, this test merely replaces one line-drawing problem with another.

A third possible method of distinguishing the commercial from the noncommercial is to develop the *New York Times* holding into a rule that advertising which addresses "matters of the highest public interest and concern" is protected by the first amendment.[69] However, if social commentary is sufficient to invoke first amendment protection, an advertiser would arguably be able to use any public issue as a shield for his advertisement.[70] To forestall such use of incidental social commentary, something more than mere association with a public issue must be required or the rule would allow "every merchant who desires to broadcast advertising . . . to achieve immunity from the law's command."[71] Although the test could turn on such distinguishing factors as magnitude of the issue, weight of the treatment given, or purpose for making the advertisement,[72] evalua-

68. *See* Comment, *supra* note 54, at 158.

69. *See* text accompanying notes 54-59 *supra.*

70. For example, the advertiser in Valentine v. Chrestensen, 316 U.S. 52 (1942), appended a political protest against city wharfage policy to his handbill in an attempt to evade the ordinance against disseminating commercial handbills. *See* text accompanying note 51 *supra.*

71. 316 U.S. 52, 55 (1942). For example, the Chevron commercials of Standard Oil of California associated the product and its ingredient F-310 with the public concern about pollution. It would be hard to justify a policy which would not permit FTC intervention merely because pollution is discussed. Berman, *Chevron's Pollution Solution,* COMMONWEAL, Mar. 5, 1971, at 547, uses the Chevron commercial as an example of the exploitation of environmental awareness by business:

> The red-eyed, smog-filled viewer is told that big companies are more concerned with "saving the environment" than making a fast buck and that he can help the problem along by succumbing to conspicuous consumption of all salable items that promise to help avert the coming environmental crisis.

72. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rela-

tion of those factors might also be difficult and might admit of application only on a case-by-case basis.

This public interest test would encounter a further difficulty because the criteria for "matters of the highest public interest and concern" are not always clear. A specific definition of public issues might prove unworkable, because issues change constantly and are not uniform throughout the nation. However, a broad definition may not be precise enough to forewarn advertisers of the scope of regulation.[73]

2. *A Balancing Approach*

To avoid some of the difficulties involved in a test for commercial content, it should be recognized that the characterization of an advertisement as "commercial" or "noncommercial" is a conclusion of law—simply another way of indicating whether regulation is considered appropriate. Thus the best "test" is one which identifies the respective interests involved and denominates "commercial"—and thus subject to regulation—that ad-

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tions, 413 U.S. 376, 385 (1973), may anticipate such a possibility. *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

73. Jones, *The Cultural and Social Impact of Advertising on American Society*, 8 OSGOODE HALL L.J. 65, 74 (1970) states that any product advertising, to be effective, "of necessity must replay or reflect some cultural aspects of our society. . . ." If such implicit social commentary were held sufficient to constitute a first amendment defense, the commercial exception doctrine would be defunct. This result could be avoided by an admission that the social commentary in the average product advertisement does not approach an issue of "public interest and concern," as the term was apparently used in New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964). However, in Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971), the court observed that the application of the "fairness doctrine" was triggered by advertisements extolling the desirability of big automobiles. Although the advertisements themselves were silent as to the effect of large engines on the environment, they did affect social value judgments concerning clean air and pollution. *See* Comment, *The Fairness Doctrine Requires Rebuttal to Air Pollution Policies Implicitly Espoused by Car and Gasoline Commercials*, 50 TEX. L. REV. 500 (1972).

Similarly, in reference to the FTC's proposal to regulate "nonrational" advertising, one writer has stated:

> Since television occupies a central place in most households, the viewer is continuously engulfed with messages which educate, messages which set standards, and messages which instill drives. Attitudes and life styles are most certainly influenced by the medium. Thus, the importance of understanding the new television advertising, as well as new advertising in general, cannot be overemphasized.

Thain, *Consumer Protection: Advertising—The FTC Response*, 26 FOOD DRUG COSM. L.J. 609, 622 (1971).

vertisement for which the interests in regulation outweigh the interests in protection.

The interest of the advertiser in being heard originates in the preferred place of speech in our society; it is reflected in the protection accorded to speech by the first amendment. That interest is reinforced by the fact that the advertiser bears the expense of being heard. A monetary interest alone, however, does not warrant first amendment protection; cases such as *New York Times* indicate some of the nonmonetary interests that might be sufficient to invoke such protection.[74]

To the advertiser's interest should be added the community's interest in hearing all sides of important public questions.[75] This interest is not served, however, by the dissemination of false facts,[76] although it might be served by the dissemination of erroneous ideas. Consequently, corporate image advertising which supports its message with erroneous factual information would not perform a function protected by the first amendment and theoretically would deserve protection only to the extent that it is a factually correct statement.[77] In practice, the distinction between factual assertions and opinion is not always clear. As the Supreme Court stressed in *Gertz v. Robert Welch, Inc.*,[78]

74. *See* note 56 *supra.*

75. *See generally* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; Redish, *supra* note 50, at 434-36.

76. *See* Gertz v. Robert Welsh, Inc., 94 S. Ct. 2997, 3007 (1974), in which the Court stated:

> But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. New York Times Co. v. Sullivan, 376 U.S. at 270. . . . They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 . . . (1942).

Gertz, however, was a libel action and thus not entirely on point. The extent to which its analysis can be transferred to the different interests involved in advertising is speculative. *Cf.* Redish, *supra* note 50, at 459, which argues that libel suits and FTC regulation cannot be equated because the "chilling effect" of libel is greater.

77. As an illustration, Mobil Oil Company has asserted that as only one oil well in sixty pays off, higher gasoline prices and larger corporate profits are needed to develop more sources of oil. Figures compiled for the American Petroleum Institute indicate that three out of five new wells are productive. *See* Minneapolis Star, Apr. 25, 1974, § B, at 30, col. 1. While a corporation's claims that higher profits are justified is perhaps protected, the use of erroneous factual material to support these claims would not be.

78. 94 S. Ct. 2997 (1974).

"Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate."[79] Drawing a distinction between factual statements and opinion in an advertisement might present difficulties, and the result is likely to be a case-by-case approach to the problem.[80]

Because the Supreme Court has not subjected the commercial exception doctrine to a searching analysis, it has not clearly identified the interests served by regulation. Commentators have suggested several justifications for regulating advertising,[81] but only in the context of product advertising, not corporate image advertising. The first of these justifications is that false advertising, unlike erroneous ideas, does not address matters of public importance and therefore does not deserve a forum.[82] Thus, corporate image advertising which does address a matter of public importance would apparently deserve protection, regardless of any accompanying commercial motive, message, or effect. Under regulations supported by this justification the identification of matters of public interest again becomes the crux of the problem.[83]

A second justification for regulating advertising is that while erroneous ideas may contribute to the intellectual process, false product advertising adds nothing to the product.[84] To the extent that issue-oriented corporate image advertising contributes to the intellectual process then, it would not seem correct to encroach upon the advertiser's freedom of speech. However, this will present no obstacle to the regulation of false factual assertions, which do not contribute to the intellectual process.[85]

79. *Id.* at 3007.

80. The restriction of regulation to matters of factual assertions is supported by a phenomenon peculiar to corporate image advertising. The credibility of an advertisement is determined by the factual assertions made to support it. Unless the advertisement is supported by facts, it will not be believed. As a practical matter, then, regulation of factual assertions alone would be sufficient to control abuse of corporate image advertising. *See* Day, *Closing the Credibility Gap in Environmental Control*, BUS. MGMT., June, 1971, at 29, 36. In the context of product advertising, Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 445 (1964), argues that only factual claims should be regulated; the FTC should not concern itself with an advertisement's economic utility.

81. *Developments in the Law—Deceptive Advertising, supra* note 56, at 1029-31.

82. *Id.* at 1029-30.

83. *See* text accompanying notes 69-73 *supra.*

84. *Developments in the Law—Deceptive Advertising, supra* note 56, at 1030.

85. One justification for subjecting advertising to a "test of truth"

Finally, it is suggested that advertising should be regulated to protect the consumer who would otherwise be unable to discover deception until after he has been injured by purchasing an inferior, advertised product.[86] Arguably, the consumer should be protected against inferior ideas in the same manner he is protected against inferior goods, but there is no mechanism for securing such "protection" in a free society. Accordingly, this justification for regulation does not appear to have much relevance to corporate image advertising of the issue-oriented variety.

In view of all the interests involved in the application of the commercial exception doctrine to corporate image advertising, it would appear that the factual claims made in image advertising could be regulated without transgressing first amendment guarantees, but that there is no corresponding justification for the regulation of ideas. This is consistent with the basic objective of advertising regulation, which is to protect the consumer against false or deceptive claims, not to censor advertisers' "incorrect" ideas.

III. THE ROLE OF THE FEDERAL TRADE COMMISSION

A. JURISDICTION

The jurisdiction of the FTC is limited by the requirements of section 5 of the Federal Trade Commission Act that the acts or practices regulated be "in commerce" and that "a proceeding by [the FTC] in respect thereof would be to the interest of the public . . . ."[87] The requirement that the acts or practices be

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in contrast to the general rule that truth is immaterial to first amendment protection of speech is the greater susceptibility of advertising claims to factual verification. *See id.* at 1030-31.

86. *See* Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1197 (1965).

87. 15 U.S.C. § 45 (1970) (originally enacted as Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 92) reads in pertinent part:

> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.

A bill currently pending in Congress would expand the FTC's jurisdiction in the area of consumer protection. *See* H.R. 7917, 93d Cong., 1st Sess. (1973). Reported to the House floor in H.R. REP. No. 1107, 93d Cong., 2d Sess. (1974).

"in commerce" has been interpreted by the Supreme Court to deny the FTC jurisdiction over wholly intrastate sales. In *FTC v. Bunte Brothers*,[88] the Court held as a matter of statutory construction that because section 5 specifies activities "in commerce," rather than "affecting commerce," Congress intended to grant to the FTC only part of its broad constitutional power over commerce.[89] Although the sales of candy in *Bunte Brothers* admittedly "affected" interstate commerce, they did not meet the stricter "in commerce" requirement and the FTC was without jurisdiction.

While *Bunte Brothers* has not been directly challenged, and other federal courts have upheld the distinction,[90] its authority seems to be in doubt.[91] It has been suggested that the only reason the *Bunte Brothers* distinction has survived is that the FTC is discouraged for practical reasons from attempting to expand the limits of its jurisdiction.[92] The FTC has, however, asserted jurisdiction over local sellers who advertise by means of interstate media,[93] but this assertion has not been tested in the courts.[94] In *Guziak v. FTC*,[95] the Court of Appeals for the Eighth Circuit held that an aluminum siding vendor who advertised through interstate media and effected a minimal number of interstate sales was "in commerce" for the purposes of section 5. The court stressed that there was no "basis . . . for holding that the Commission may not assert its power until the interstate activity under scrutiny has reached a certain magnitude."[96] This is not to say, however, that advertising in interstate commerce alone would be sufficiently "in commerce," and the court seems to suggest that at least one interstate sale would be required.

While interstate advertising alone may not be enough to support jurisdiction, the FTC would have jurisdiction if the adver-

88. 312 U.S. 349 (1941).
89. *Id.* at 355
90. *See, e.g.*, Royal Oil Corp. v. FTC, 262 F.2d 741 (4th Cir. 1959) (intrastate commerce not subject to federal regulation even though it may competitively affect interstate commerce); California Rice Indus. v. FTC, 102 F.2d 716 (9th Cir. 1939) (fixing quotas of rice to be milled "affected" but not "in" interstate commerce).
91. Millstein, *supra* note 80, at 455-56.
92. *Id.* at 456.
93. S. Klein Dep't Stores, 57 F.T.C. 1543 (1960).
94. Bankers Sec. Corp. v. FTC, 297 F.2d 403 (3d Cir. 1961) held that the FTC had jurisdiction where both interstate delivery of goods and advertising in interstate newspapers had occurred. Jurisdiction may conceivably rest on either ground.
95. 361 F.2d 700 (8th Cir. 1966).
96. *Id.* at 703.

tiser carries on interstate sales as well. Corporate image advertising could create special jurisdictional problems, as by definition this type of advertising is designed to sell ideas rather than products.[97] There is no requirement, however, that the regulated advertising be the *cause* of the interstate sales, and all corporate image advertising of any corporation with interstate sales could thus be subject to regulation. On the other hand, the corporate image advertiser who conducts no interstate business presumably would not advertise in interstate commerce, or even if he did, would not advertise enough to justify regulation.[98] As a practical matter, the FTC would thus have jurisdiction over all significant corporate image advertising.

The requirement of section 5 that regulation be in the public interest has also been interpreted to limit FTC jurisdiction.[99] In *FTC v. Klesner*,[100] the FTC sought to enforce an order prohibiting the respondent from using the name "Shade Shop," as another business had adopted the name. The Court held that without a showing of a specific substantial public interest, the FTC lacked authority to file a complaint.[101] Recent judicial treatment of the question of public interest, however, has tended to respect the discretion of the FTC.[102] The Supreme Court has not ruled specifically on FTC discretion, but in a trade name dispute similar to *Klesner* it has held that another administrative agency, the Civil Aeronautics Board, has wide discretion in determining what is a matter of public interest.[103] It is very unlikely that a court

97. *See* note 5 *supra* and accompanying text.

98. Such speculation could be avoided if section 5 were simply amended to provide for jurisdiction on the basis of interstate advertising alone. *See* note 87 *supra*.

99. Millstein, *supra* note 80, at 483-84.

100. 280 U.S. 19 (1929).

101. *Id.* at 30. Judge Friendly suggests that this case can be interpreted in one of two ways. It may mean literally that the FTC cannot intervene in private disputes, or it may be read merely as an expression of judicial disgust with the FTC for pursuing cases of no real or economic impact. *See* Exposition Press, Inc. v. FTC, 295 F.2d 869, 877 (2d Cir. 1961) (Friendly, J., dissenting), *cert. denied*, 370 U.S. 917 (1962).

102. In Moretrench Corp. v. FTC, 127 F.2d 792, 795 (2d Cir. 1942), Judge Learned Hand distinguished *Klesner* on grounds that it "is to be put down as deciding that the court may consider whether the controversy is not in general too trivial to justify the attention of the Commission." *See* Millstein, *supra* note 80, at 483; *Developments in the Law—Deceptive Advertising*, *supra* note 56, at 1023. *See also* Exposition Press, Inc. v. FTC, 295 F.2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); Parke, Austin & Lipscomb, Inc. v. FTC, 142 F.2d 437 (2d Cir.), *cert. denied*, 323 U.S. 753 (1944); L & C Mayers, Inc. v. FTC, 97 F.2d 365 (2d Cir. 1938).

103. American Airlines, Inc. v. North Am. Airlines, Inc., 351 U.S. 79 (1956).

would rule corporate image advertising outside the FTC's jurisdiction for lack of a public interest in regulation.[104]

Corporate image advertising is not otherwise excluded from the intended scope of section 5. Although in general the legislative intent of the original Act of 1914 is anything but clear, the broad language of section 5 evidently was chosen to give the new Commission wide powers and the ability to adapt the definition of "unfair methods of competition" to changing circumstances.[105] The Wheeler-Lea Act[106] amended the FTC Act in 1938 to allow the Commission to regulate in the interest of the consumer as well as in the interest of competition, and its legislative history indicates that the regulation of false advertising was intended.[107] There is nothing to indicate that Congress had any particular type of false advertising in mind or that it sought to exempt any particular type. The language of the Act and the broad congressional approval given FTC efforts to regulate advertising compel the conclusion that the scope of the FTC's authority is broad enough to include corporate image advertising.[108]

For several reasons, as a matter of practice the FTC has limited its regulation almost solely to product advertising. The amount of corporate image advertising is insignificant in relation to product advertising.[109] The latter type of advertising has also represented a greater potential for injury both to the consumer

104. Millstein, *supra* note 80, at 484. The FTC's decision to actually assert jurisdiction and to regulate corporate image advertising, however, would involve a different set of considerations. *See* text accompanying notes 109-11 *infra*.

105. S. REP. No. 597, 63d Cong., 2d Sess. 13 (1914); H.R. REP. No. 1142, 63d Cong., 2d Sess. 18-19 (1914). Power to regulate advertising as an "unfair method of competition" was asserted by the Commission in 1916 in its annual report: "[I]n certain cases of misbranding and falsely advertising the character of goods where the public was particularly liable to be misled, the Commission has taken jurisdiction." 1916 FTC ANN. REP. 6. This assertion of jurisdiction was apparently not intended by the framers of the Act. *See* Millstein, *supra* note 80, at 450. Nevertheless, the court upheld the FTC's jurisdiction over advertising in Sears, Roebuck & Co. v. FTC, 258 F. 307 (7th Cir. 1919). *Accord* FTC v. Winsted Hosiery Co., 255 U.S. 483 (1922).

106. Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111, *amending* 15 U.S.C. § 45 (1934) (codified at 15 U.S.C. § 45 (1970)).

107. Senator Wheeler, reporting the Wheeler-Lea Act on the floor of the Senate, stated: "The Federal Trade Commission has always had jurisdiction over false advertising of foods, drugs, devices, and cosmetics, as well as over all other commodities." 83 CONG. REC. 3255 (1938).

108. *See id.* at 3255-56. *But see* Bird, Goldman & Lawrence, *supra* note 63, at 414-15.

109. *See* note 2 *supra*.

and to competition because it is a direct inducement to buy.[110] Finally, the claims of product advertising are more readily susceptible of verification.[111] However, while the FTC has accordingly concentrated its finite resources on product advertising, this cannot be regarded as abdication of jurisdiction over corporate image advertising.

Precedent supporting jurisdiction over corporate image advertising is supplied by cases in which the FTC has successfully exerted regulation over misrepresentations of matters extrinsic to the product itself. It has long been recognized as an unfair practice for a seller to represent himself as a manufacturer when in fact he does not manufacture, or for a seller to misrepresent the origin of his wares.[112] The rationale is not that the misrepresented goods are somehow inferior; rather, it is that a consumer should be free to exercise his preference for manufacturers over jobbers, or for the products of one country over those of another.[113] The same rationale can be extended to corporate image advertising to the extent that it is used by the advertiser to improve its image and thereby promote sales. The consumer who chooses to form product preferences on the basis of the policies or practices of the producer should be free to exercise this choice.

B. Rationale of Regulation

Before 1938, the only approach to the regulation of advertising available to the FTC under section 5 was to find the advertising an "unfair method of competition." Such a finding required a demonstration of some injury to competition.[114] Since this precluded regulation where there was no competition, or where all competitors alike engaged in the practice,[115] Congress amended section 5 to place protection of consumers on a common level

110. *See* text accompanying note 39 *supra.*

111. Note, *supra* note 86, at 1197.

112. Barnes, *The Law of Trade Practices—II: False Advertising,* 23 Ohio St. L.J. 597, 618 (1962).

113. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 388 (1965); FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934); FTC v. Royal Milling Co., 288 U.S. 212, 217 (1933).

114. FTC v. Raladam Co., 283 U.S. 643 (1931) (FTC powerless to act unless injury to competition can be shown); Millstein, *supra* note 80, at 453. The passage of the Wheeler-Lea Act has made regulation by the "unfair method of competition" approach obsolete. *See* text accompanying note 106 *supra.*

115. FTC v. Raladam Co., 283 U.S. 643 (1931) (no injury to competition because there was no competition).

with protection of competition.[116] The Wheeler-Lea Act added to section 5 the phrase "unfair or deceptive act or practice."[117] This amendment has provided the FTC with the alternatives of finding advertising "deceptive"[118] or "unfair."

1. Deceptive Practices

The determination that an advertisement is deceptive is a four step operation. First, in order to establish some parameters of what is deceptive or potentially deceptive, it is necessary to establish an intelligence level against which the advertisement can be measured.[119] As a rule, an intelligence level somewhat below that of the "reasonable man" of tort law is employed,[120] because regulation is designed to protect "the credulous as well as the wary."[121] Second, it is necessary to determine what the advertisement means, or what promise is made, with reference to

116. *See* 83 CONG. REC. 3256 (1938) (remarks of Senator Wheeler).

117. Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111, *amending* 15 U.S.C. § 45 (1934) (codified at 15 U.S.C. § 45(a)(1) (1970)). *See* text accompanying note 106 *supra*.

118. *See* Jentz, *Federal Regulation of Advertising: False Representation of Composition, Character, or Source and Deceptive Television Demonstrations*, 6 AM. BUS. L.J. 409, 416-17 (1968).

119. Millstein, *supra* note 80, at 457-65.

120. Note, *Psychological Advertising: A New Area of FTC Regulation*, 1972 WIS. L. REV. 1097, 1100.

121. Charles of the Ritz Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944). Thain, *supra* note 73, at 615, suggests that the FTC will seek to adjust the intelligence level against which the advertisement will be judged for cases involving special groups such as children, the elderly, or the handicapped, who can be expected to be particularly vulnerable to certain kinds of claims. *See* text accompanying note 145 *infra*.

Where special audiences are not involved, the low level at which the intelligence standard is set has elicited criticism on grounds that it is wasteful and makes the FTC "look fairly foolish in this business of protecting fools," Alexander, *Federal Regulation of False Advertising*, 17 U. KAN. L. REV. 573 (1969), and on constitutional grounds because an intelligence level set this low denies the advertiser freedom of speech, Millstein, *supra* note 80, at 492.

In Heinz v. Kirchner, [1961-63 Transfer Binder] TRADE REG. REP. ¶ 16,664, at 21,540 (FTC 1963) the Commission stated: "A representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." However, in ITT Continental Baking Co., 3 TRADE REG. REP. ¶ 20,464 (FTC 1973) the Commission, in reviewing a Wonder Bread advertisement, noted that although "most people above age six might view the literal message of the 'fantasy growth sequence' with skepticism," this would not prevent a finding that the advertisement had a potential for deceiving others. *See also* Eastern Detective Academy, Inc., [1970-73 Transfer Binder] TRADE REG. REP. ¶ 19,727 (FTC 1971) (reaffirmation that the law protects the credulous as well as the wary).

the selected intelligence level. Current practice is for the FTC to make this determination,[122] and the courts with rare exception defer to the Commission's expertise.[123] Third, it must be determined if the message or promise is true. This determination requires that the advertiser provide "substantial proof," both in the Commission's proceedings and on review.[124] Finally, the false message or promise must be found to be material. The test of materiality is whether the assertion is "capable of affecting purchasing decisions."[125] In establishing materiality, it is not important to prove actual deception, but only that the advertisement has the capacity to deceive.[126] The finding of materiality is also within FTC discretion.[127]

A determination that corporate image advertising is deceptive or potentially deceptive would thus follow the steps of selection of an intelligence level, interpretation of the advertisement to determine the promise made, evaluation of this promise for truthfulness, and assessment of the materiality of any untruth. This procedure has been employed for product advertising and should be feasible for similar, sales-oriented corporate image advertising. Indeed, the FTC has dealt with closely analogous situations in cases involving misrepresentation of extrinsic matters.[128] Cases involving misrepresentation of status are particularly relevant, as there is little difference between a seller who seeks to induce consumer confidence by misrepresenting his status and a corporation which seeks the same end by misrepresenting, for example, its concern with the environment.[129]

122. Gellhorn, *Proof of Consumer Deception before the Federal Trade Commission*, 17 U. KAN. L. REV. 559, 565 (1969); Millstein, *supra* note 80, at 465, 470; *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1043 (1967). Gellhorn in particular criticizes the failure to use market surveys to determine what the advertisement means. Failure to use surveys and minimal reliance on expert testimony results in the advertisement meaning what the FTC says it means. Millstein, *supra* note 80, at 470. The Commission allowed the admission of market surveys in ITT Continental Baking Co., 3 TRADE REG. REP. ¶ 20,464, at 20,377 (FTC 1973), but made no effort to conduct its own.

123. Kalwajtys v. FTC, 237 F.2d 654 (7th Cir.), *cert. denied*, 352 U.S. 1025 (1957).

124. Millstein, *supra* note 80, at 478-83.

125. *Developments in the Law—Deceptive Advertising, supra* note 122, at 1056.

126. Millstein, *supra* note 80, at 485.

127. FTC v. Mary Carter Paint Co., 382 U.S. 46, 49 (1965). *See also Developments in the Law—Deceptive Advertising, supra* note 122, at 1056.

128. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965).

129. *See* text accompanying notes 112-13 *supra*.

There might be difficulty in determining that the misrepresentation is material, because the inducement of image advertising is indirect. Liberal criteria of materiality may be justified on the ground that all sales-oriented advertising is necessarily intended to induce consumer action, and a conclusion that the false statement is "capable of affecting purchasing decisions" therefore conforms to the presumed intent with which the statement is made.[130]

Regulation of deceptive practices in issue-oriented corporate image advertising might be more difficult because the correlation between misrepresentation and inducement would typically be more attenuated. In the assessment of materiality, it is assumed that the induced action will be the purchase of a product or service, or some other commercial act. However, if the misrepresentation were allegedly material in a noncommercial sense, then the simple approach to materiality would no longer be acceptable; even if it is found that the statement is intended to induce some type of social or political action, there is a difference between such action and a simple consumer purchase. The more probable result would be that unless the representation were material in a commercial sense, the advertisement would be protected by the first amendment.[131]

Of greater interest, however, is the problem of interpreting the issue-oriented advertisement to determine its claim or promise. It is entirely conceivable that such an advertisement would have two permissible interpretations, one involving interests protected by the first amendment and another involving interests more appropriately subjected to regulation. Clearly, if the FTC chooses between such interpretations in a seemingly arbitrary manner,[132] without reference to the interests involved, and courts of appeals continue to give only cursory review to the Commission's choices,[133] a possible result would be a holding by the Supreme Court or a declaration by Congress that the first amendment precludes all regulation of issue-oriented advertising. The FTC should develop internal safeguards to prevent such a result, and courts of appeals should carefully enforce those safeguards.

130. *See Developments in the Law—Deceptive Advertising, supra* note 122, at 1056.

131. The absence of materiality points to a basic logical difficulty in labelling an issue-oriented corporate image advertisement "deceptive." If consumer purchase decisions are not affected, there appears to be no deception. *See* FTC v. Colgate-Palmolive, Inc., 380 U.S. 374, 395 (1965) (Harlan, J., dissenting).

132. *See* note 122 *supra.*

133. *See* text accompanying note 123 *supra.*

2. Unfair Practices: The Unfairness Doctrine

The language added to section 5 by the Wheeler-Lea Act makes "*unfair* . . . acts or practices" unlawful.[134] This has become the basis of an "unfairness doctrine" under which the FTC exercises power to prohibit trade practices which are unfair to consumers. This power was upheld by the Supreme Court in *Sperry & Hutchinson v. FTC* .[135] Respondent, the leader in the trading stamps industry, sought to prevent trading in its stamps except by its own franchises. The Court of Appeals for the Fifth Circuit held that the FTC was without statutory power to declare this practice "unfair."[136] The Supreme Court reversed, holding that section 5 did indeed contain such a grant of power. Although the Court did not offer a precise definition of unfairness, it suggested some general guidelines in a footnote to the opinion:

> (1) whether the practice, without having been considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise . . . ; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers. . . .[137]

The Commission's approach to the problem of unfairness in advertising is illustrated by its decision in the leading case of *Pfizer, Inc.*[138] There the Commission stated that an advertiser who makes claims of product performance or safety without prior substantiation of these claims is unfair to the consumer who is expected to rely upon such representations.[139] Subsequent comment by the FTC has made it clear that the unfairness doctrine

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134. Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111, *amending* 15 U.S.C. § 45 (1934) (codified at 15 U.S.C. § 45(a)(1) (1970)) (emphasis added). This is not the same as an "unfair method of competition," discussed in text accompanying notes 114-18 *supra*, because there is no requirement that competition or competitors be affected by the unfair practice.

135. 405 U.S. 233 (1972).

136. Sperry & Hutchinson Co. v. FTC, 432 F.2d 146 (5th Cir. 1970).

137. 405 U.S. at 244-45 n.5. This footnote quotes the FTC's "Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labelling of Cigarettes in Relation to the Health Hazards of Smoking," 29 Fed. Reg. 8324 (1964). *See also* Note, *supra* note 120, at 1106-11, 1124. *Cf.* S. 3377, 93d Cong., 2d Sess. (1974) (bill to require standardization of product testing criteria).

138. Pfizer, Inc., [1970-73 Transfer Binder] TRADE REG. REP. ¶ 20,056 (FTC 1972).

139. The complaint in *Pfizer* alleged that respondent advertised its sunburn remedy, Un-Burn, without having tested it first. The complaint was dismissed by the Commission, precluding judicial review. *See* Note, *Unfairness in Advertising: Pfizer, Inc.*, 55 VA. L. REV. 324, 340, 346 n.147 (1973).

applies to affirmative advertised claims for which the advertiser does not have a "reasonable basis."[140]

To satisfy the reasonable basis requirement, the advertiser must have evidence that would reasonably support the claim made, and this evidence must be the product of reasonable measures to verify the claim.[141] The first requirement is a factual issue dependent upon such considerations as the specificity of the claim, the type of product involved, the hazard posed if the claim is false, the degree of consumer reliance placed on the claim, and the type and accessibility of the evidence. While in *Pfizer* the Commission indicated that something less than scientific studies might be sufficient,[142] later complaints issued by the FTC have indicated that it might require claims to be supported by "competent scientific tests."[143] The requirement that the advertiser make reasonable efforts to obtain verification went undiscussed in *Pfizer*. The extent of the reasonable efforts requirement awaits precise definition, but it has been suggested that reasonable efforts consist of well-documented testing by impartial experts.[144]

Application of the unfairness doctrine is not limited to advertising involving untruthfulness. For example, it has been argued that advertising which appeals primarily to vulnerable groups such as children, the elderly, or the handicapped might be unfair, even though not strictly deceptive.[145] Similarly, advertising which invokes irrelevant factors such as sex appeal, rather than the objective utility of the product, has been questioned

140. Note, *Pfizer Reasonable Basis Test—Fast Relief for Consumers but a Headache for Advertisers*, 1973 DUKE L.J. 563; Note, *The FTC Ad Substantiation Program*, 61 GEO. L.J. 1427, 1430-31 (1973).

141. Note, *supra* note 139, at 339-42.

142. Pfizer, Inc., [1970-73 Transfer Binder] TRADE REG. REP. ¶ 20,056, at 22,036, 22,039 (FTC 1972).

143. *See* General Motors [1970-73 Transfer Binder] TRADE REG. REP. ¶ 20,120 (FTC 1972) (complaint issued Oct. 12, 1972, alleging failure to substantiate claims made about the chassis of General Motors automobiles).

144. Note, *supra* note 139, at 339-42. *See* the FTC's "Resolution Requiring Submission of Special Reports Relating to Advertising Claims and Disclosure Thereof by the Commission," 36 Fed. Reg. 12,058 (1971).

145. Thain, *Consumer Protection: Advertising—the FTC Response*, 26 FOOD DRUG COSM. L.J. 609, 615 (1971). *See also* note 121 *supra*. The most significant feature of this argument concerns limitations on advertising for children. In this regard, it is interesting to note that the Canadian Broadcasting Company has decided to eliminate advertising on children's programs by the end of 1974. *See* 662 BNA ANTITRUST TRADE REG. REP. A-23 (May 7, 1974).

as unfair because it does not give the consumer information on which to base a rational buying decision.[146]

The FTC has begun a program requiring advertisers to submit to the FTC the material which allegedly supports their advertised claims.[147] Originally, this was done to further the statutory goal of informing the consumer by making this information available to the public.[148] It has not had much success in this respect, however; there is a long delay between demand for the material and its submission to the FTC,[149] and when received, much of the material is too bulky or technical to be of use to the consumer. Furthermore, requiring this material to be submitted may have actually induced advertisers to forego factual claims in favor of "mood" or "non-rational" claims and may have thus produced the perverse effect of further reducing the information available to the consumer.[150] Consequently, the FTC has changed the purpose for requiring substantiation to one of enforcement; it now uses the submitted material to discover product misrepresentations in the advertising.[151]

To the extent that sales-oriented corporate image advertising resembles product advertising, the same standards of unfairness are probably applicable. As these standards evolve in the context of product advertising, they should furnish clearer guidance for the regulation of sales-oriented corporate image advertising as well.

Application of the unfairness doctrine to issue-oriented corporate image advertising is more difficult. A threshold problem is the absence of any indication of what types of unfairness are affected. If a distinction can be made between unfairness to the consumer in his economic interests and unfairness in his non-

146. Note, *supra* note 120, at 1097.

147. Note, *The FTC Ad Substantiation Program, supra* note 140, at 1428.

148. Note, *Pfizer Reasonable Basis Test—Fast Relief for Consumers but a Headache for Advertisers, supra* note 140, at 596; Note, *supra* note 139, at 336. The basis for a program of consumer education lies in the avowed intent of Congress in passing the FTC Act to educate the public. *See* ABA COMM. TO STUDY THE FEDERAL TRADE COMMISSION 69-70 (1969).

149. The delay between submission of data and the issuance of complaints based on deficiencies is another shortcoming of this program. *See* Note, *Pfizer Reasonable Basis Test—Fast Relief for Consumers But a Headache for Advertisers, supra* note 140, at 584-85.

150. *Id.*

151. *See* 645 BNA ANTITRUST TRADE REG. REP. AA-1 (Jan. 8, 1974). *See also* 86 BROADCASTING, March 4, 1974, at 53 (FTC Bureau of Consumer Protection Director, J. Thomas Rosch's proposal to require substantiation of the meaning of the advertisement).

economic interests, the question arises whether the FTC can regulate noneconomic unfairness. The Court's language in *Sperry & Hutchinson* can be read to include broad noneconomic interests,[152] but that language refers to the cigarette commercial ban, which is based on the FTC's unquestioned power to prohibit acts or practices injurious to the health or well-being of the public. Thus, *Sperry & Hutchinson* sheds little light on the question of the Commission's power to curb simple "unfairness" in general noneconomic matters.

Even assuming a power in the FTC to regulate noneconomic, issue-oriented corporate image advertising, the application of the unfairness doctrine would still be difficult, because the meaning of "unfairness" would still be in doubt. If, for example, the reasonable basis test of *Pfizer* were interpreted to mandate a reasonable factual basis for the opinions expressed in issue-oriented advertising, the result would be a "chilling effect" on the advertiser's freedom to state his opinions independent of any factual basis. Application of the reasonable basis test only to the factual assertions actually expressed might reduce the strain on the first amendment, but this would still involve a cumbersome inquiry into the issue of reasonable verification. That inquiry can be avoided by adopting objective truthfulness of expressed assertions as the standard for invoking the unfairness doctrine. This is the standard presently used in the regulation of *deceptive* practices, but its proposed employment in the context of *unfair* practices would avoid the difficulty inherent in the deceptive practices approach—the difficulty of showing noneconomic materiality.[153] A determination that incorrect factual assertions in a corporate image advertisement were unfair rather than deceptive would avoid the requirement of showing a causal relationship to consumer action.

Regardless of the approach used, labelling an erroneous factual assertion "unfair" can imply that the entire advertisement

152. *See* note 137 *supra* and accompanying text.

153. *See* text accompanying note 131 *supra*. *Cf.* ITT Continental Baking Co., 3 TRADE REG. REP. ¶ 20,464 (FTC 1973), in which, in a commercial context, the majority rejected an allegation of unfairness based on deception. Believing the deceptive practices approach to be more appropriate in that product-advertising case, the majority stated:

> As complaint counsel develop their unfairness argument, it rests almost entirely on the fact that the advertisements make *false* promises rather than that they address themselves to particularly vulnerable aspects of their audiences which might conceivably render even truthful messages unfair.

Id. at 20,382.

is "unfair." Such an implication might appear to threaten the advertiser's freedom of speech. The threat is greater when the FTC enjoys wide discretion in the application of standards of unfairness. Thus an objective standard of factual accuracy should be employed to diminish the threat to first amendment liberties. The Commission should be careful not to impute a finding of unfairness to the entire advertisement, especially to the opinions or conclusions expressed therein. If an opinion or conclusion necessarily rests on a factual basis found to be "unfair," then it is difficult to avoid concluding that the opinion expressed is unfair. But the policies of the first amendment would be best served if such an inference were left to the public.

C. Remedies

In its regulation of advertising the FTC enjoys broad discretion in the selection of remedies, limited only by the requirement that the remedy selected must have a "reasonable relation to the unlawful practices found to exist."[154] The usual remedy for deceptive or unfair advertising is the cease and desist order contemplated by the FTC Act.[155] That order has been criticized as ineffective because it addresses only future dissemination of the advertisement. Indeed, such an order does not take effect until the proceedings are final, and in the interim the advertiser is free to continue using the advertisement.[156] Often by the time

154. FTC v. National Lead Co., 352 U.S. 419, 429 (1957); *accord* Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1964).

155. 15 U.S.C. § 45(b) (1970). *See* note 87 *supra*. *See also* Note, *The Pfizer Reasonable Basis Test—Fast Relief for Consumers but a Headache for Advertisers*, *supra* note 140, at 587.

156. The *cause celebre* of an advertiser dragging out a proceeding while continuing to disseminate the allegedly deceptive advertising is Carter Products, Inc. v. FTC, 268 F.2d 461 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959). *See* Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 Fed. Com. B.J. 548, 561-63 (1964). The grant of injunctive powers to the FTC should remedy this defect to a certain degree. A temporary restraining order can be granted

> whenever the Commission has reason to believe—
>
> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or . . . has become final, would be in the interest of the public. . . .

14 U.S.C. § 53(b) (1970). Injunctive relief has been granted in two cases: Travel King, Inc., 3 Trade Reg. Rep. ¶ 20,502 (FTC 1974) (promotional practices of a "psychic surgery" tour to the Philippines); FTC

the order becomes effective, the advertising campaign has expired of its own accord.[157] In any event, a cease and desist order does not eliminate any residual effect which the advertising may have generated. False impressions created by the advertisement may well survive a cease and desist order.[158]

As a remedy for these shortcomings of cease and desist orders, corrective advertising[159] was proposed during the litigation of *Campbell Soup Co.*[160] Campbell's had been accused of using marbles at the bottom of a bowl in a mock-up of its soup, so that the soup would appear to contain more solid ingredients than it actually did. A group of law students organized as SOUP (Students Opposed to Unfair Practices) sought to intervene in the case and argued that since a cease and desist order would not undo the harm done both to consumers and to competitors who did not engage in that practice, Campbell's should be required to disclose in its future advertising that it had employed a deceptive practice. Although the cease and desist order did not include a requirement for corrective advertising, the Commission indicated that such a requirement would have been within its authority.[161]

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v. British Oxygen Co., 5 TRADE REG. REP. ¶¶ 75,003-04 (D. Del. 1974) (an acquisition). The FTC has declined to set down any guidelines for the use of its injunctive power, 646 BNA ANTITRUST TRADE REG. REP. A-6 (Jan. 15, 1974), but J. Thomas Rosch, Director of the FTC's Bureau of Consumer Protection, stated in an interview that the injunctive powers will not be used in any "novel" cases (as reported in 645 BNA ANTITRUST TRADE REG. REP. AA-1 (Jan. 8, 1974)).

157. Note, *supra* note 139 at 331-32.

158. Thain, *supra* note 145, at 612-13.

159. Corrective advertising would eliminate the effects of delay during litigation. The advertiser, facing the prospect of being required to undo his advertising at a later date, would not be able to continue using the advertisement with impunity during litigation. *See* Note, *The Federal Trade Commission and the Corrective Advertising Order*, 6 U. SAN FRANCISCO L. REV. 367, 379 (1973); *see also* Note, *supra* note 139, at 334.

160. Campbell Soup Co., [1967-70 Transfer Binder] TRADE REG. REP. ¶ 19,261 (FTC 1970).

161. *Id.* at 21,423. The practice of the Commission staff in such cases had originally been to seek corrective advertising, which would disclose that former advertising practices had been found to be deceptive. In later proceedings, the staff has sought only orders requiring that advertisers correct the false impressions which might linger in the mind of the public. Thain, *Corrective Advertising: Theory and Cases*, 19 N.Y.L.F. 1, 7-8 (1973). *See also* Firestone Tire & Rubber Co., [1970-73 Transfer Binder] TRADE REG. REP. ¶ 20,112 (FTC 1973), *aff'd on other grounds*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). To avoid the appearance of issuing a punitive order, which would have been beyond the power of the FTC, the Commission required a high degree of proof that a "residual effect" in fact existed. *Firestone* did not estab-

Affirmative disclosure of material facts so as to indirectly admit past misrepresentation is another type of remedy available to the FTC. In the case of *J. B. Williams Co. v. FTC*,[162] for example, the FTC sought to require the maker of Geritol to affirmatively disclose in its advertising that the majority of people who are physically tired do not suffer from "iron poor blood" and that Geritol is effective only for a minority of iron anemia sufferers, thus indirectly admitting that its previous advertising to the contrary had been deceptive.[163] This type of affirmative disclosure has not been a favorite remedy of the FTC, and part of the problem may be the lengths to which advertisers will go to avoid it. *J. B. Williams* is notorious for the duration of the litigation.[164]

Finally, the FTC has proposed counter-advertising to offset effects of advertising. Counter-advertising invokes the "fairness doctrine" of the Federal Communications Commission (FCC), which requires that the broadcast media balance its programing by presenting both sides of controversial public issues. A familiar example of the doctrine's application to advertising is the recent series of anti-smoking commercials. But the FCC has never been anxious to cooperate with the counter-advertising proposal, and has recently decided to reject it.[165] In addition, the recent decision in *Miami Herald Publishing Co. v. Tornillo*[166] suggests that there may be constitutional obstacles to mandatory counter-ad-

lish criteria for proof of a "residual effect," however, and it will be for later cases to determine this criteria. *See* Thain, *supra*, at 14. In ITT Continental Baking Co., [1970-73 Transfer Binder] TRADE REG. REP. ¶ 20,242 (FTC 1973) a motion to intervene was denied to three consumer groups who advanced the proposition that once deception had been shown, a prima facie case of residual effect had been made and the burden of proof should then shift to the advertiser to refute. *Cf.* Dyer & Kuehl, *The "Corrective Advertising" Remedy of the FTC: An Experimental Evaluation*, 38 J. MKTG., Jan., 1974, at 48, 53-54 (advertisement to correct the false impression without disclosing that a deception had been perpetrated may not be effective).

162. 381 F.2d 884 (6th Cir. 1967).

163. *See also* Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18 (5th Cir. 1960) (advertiser of remedy for baldness ordered to affirmatively disclose that most cases of baldness cannot be cured).

164. In the most recent episode in the ongoing struggle between the FTC and J.B. Williams, the Court of Appeals for the Second Circuit ruled that the issue of noncompliance with an FTC order is a jury question. U.S. v. J.B. Williams Co., 498 F.2d 414 (2d Cir. 1974).

165. 671 BNA ANTITRUST TRADE REG. REP. A-16 to -17 (July 9, 1974). FTC Chairman Engman is reported to have observed that the advertisements to which counter-advertising could have been applied are those which cannot be regulated by usual methods because of the first amendment. *Id.*

166. 94 S. Ct. 2831 (1974).

vertising. The Court struck down the Florida "right-of-reply" law,[167] which required newspapers to print replies to editorials.[168] This holding might be limited to editorials or limited to the print media, but the critical factor of compulsory publication[169] would also be present in any counter-advertising order.

IV. CONCLUSION

Regulation of corporate image advertising is a delicate matter because it involves a potential for infringement of first amendment freedoms. The delicacy is increased by the fact that the only agency likely to be entrusted with such regulation is the Federal Trade Commission. Both the philosophy and the procedures of the FTC have been shaped in the context of commercial affairs[170] and, without modification, are not necessarily suitable for the regulation of noncommercial corporate image advertising. Thus, while the first amendment undoubtedly permits some measure of FTC regulation, it is necessary that appropriate limitations be recognized. Generally, insofar as regulation is patterned after the regulation of conventional product advertising, it should be limited to the sales-oriented variety of corporate image advertising, while regulation of issue-oriented advertising should be limited to a determination of the truth or falsehood of express factual representations. Such limitations, coupled with strict judicial review to enforce procedural safeguards against arbitrary administrative action,[171] should result in the

167. FLA. STAT. ANN. § 104.38 (1973).

168. 94 S. Ct. at 2838-39.

169. [T]he Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which " 'reason' tells them should not be published" is unconstitutional.

Id. *See also* Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (no obligation under the FCC "fairness doctrine" for broadcast media to accept paid "advertorials"); Chicago Joint Bd., Amalgamated Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1973) (no obligation for print media to accept paid editorial advertisements).

170. For a discussion of the framework of commercial advertising into which the FTC fits, see, *e.g.*, *Developments in the Law—Deceptive Advertising*, *supra* note 122, at 1008-12.

171. For example, in NLRB v. United Steelworkers, 357 U.S. 357 (1958), the Court required the NLRB to consider all relevant factors in deciding future cases involving "no-solicitation" rules, because of the first amendment questions involved. *Cf.* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974), which upheld the power of the FTC to establish trade regula-

proper balance between the consumer's need for protection and the advertiser's freedom of speech. Within such limitations, there is no reason why all of the remedies now available to the FTC in a commercial context should not also be available for use against the careless corporate image advertiser.

tions. The court was of the opinion that judicial review of FTC action would suffice to prevent arbitrary or discriminatory regulations. First amendment rights, however, were not involved in that case.